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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Sunbelt Industries, Inc.--Reconsideration

File: B-245780.2

Date: October 29, 1991

Earl Mannion for the protester.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's opening of bids without acting on agency-level protest constituted constructive notice to protester of adverse action, notwithstanding protester's assumption that agency would not proceed with bid opening until protest was resolved; protest to General Accounting Office of agency's subsequent adverse decision, filed more than 10 days after bid opening, therefore properly was dismissed as untimely.

DECISION

Sunbelt Industries, Inc. requests reconsideration of our September 23, 1991 dismissal of its protest of the specifications under solicitation No. 7FXI-91D6-5350SQ, issued by the General Services Administration (GSA) for aluminum oxide abrasive grain.

We affirm the dismissal.

On August 21, 1991, Sunbelt filed an agency-level protest of a solicitation provision requiring newly manufactured grain and prohibiting recycled or remanufactured grain. Sunbelt alleged that the provision was unduly restrictive, as it precluded Sunbelt, a supplier of remanufactured grain, from competing for the requirement. GSA proceeded with bid opening as scheduled on August 26. On September 10, Sunbelt received a letter from GSA denying the protest.

Sunbelt then protested the matter to our Office on September 20, alleging that Federal Acquisition Regulation (FAR) § 23.401(b) prohibits agencies from excluding recycled or recovered materials in their solicitations. We dismissed the protest as untimely because it was not filed within 10 working days of when Sunbelt received actual or constructive notice of adverse action on its agency-level protest, as required by our Bid Protest Regulations,

4 C.F.R. § 21.2(a)(2) (1991). As noted in our decision, where, as here, a contracting activity proceeds with the opening of bids following an agency-level protest without undertaking requested corrective action, the protester is on notice that the agency has acted adversely to its interests; timeliness thus is measured from the bid opening date. Scopus Optical Indus., B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221. Since Sunbelt did not file its protest until September 20, more than 10 working days of the August 26 bid opening, the protest was untimely, and we dismissed it accordingly.

In its reconsideration request, Sunbelt notes that FAR § 33.102 encourages prospective protesters to seek resolution of issues with the contracting agency before filing a protest in our Office. Sunbelt asserts that, based on this provision, it assumed the agency would postpone bid opening until the agency-level protest was resolved, and thus was unaware that the agency had proceeded with the August 26 bid opening notwithstanding its protest. Sunbelt contends that its time for filing a protest in our Office therefore should be measured from September 10, the date that it received a letter GSA's letter denying its protest.

Sunbelt's position is without merit. The phrase "actual or constructive knowledge of initial adverse agency action" as used in our Regulations, 4 C.F.R. § 21.2(a)(3), is a term of art that includes knowledge that the agency proceeded with bid opening in the face of a protest against the solicitation. Consolidated Indus. Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58. Whether or not Sunbelt had actual knowledge that the agency had proceeded with bid opening, it was not entitled to assume that bid opening would be postponed. Since the bid opening date passed without having been extended, Sunbelt should have known that the procurement was continuing notwithstanding its protest. See Easco-Sparcatron, Inc., B-206114, Feb. 3, 1982, 82-1 CPD ¶ 84. Thus, Sunbelt was required to file its protest of that adverse action in our Office within 10 working days. Consolidated Indus. Skills Corp., supra. As it did not, its protest properly was dismissed as untimely.

We point out, however, that FAR § 23.401(b) does not prohibit agencies from excluding recycled or recovered materials in solicitations as Sunbelt alleges. This provision merely paraphrases the requirements of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1988), which provides generally that agencies shall procure items composed of the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition. 42 U.S.C. § 6962(c)(1). Under the RCRA, agencies may decide not to procure items composed of recovered materials if they

are not available within a reasonable period of time or at a reasonable price, or if such items fail to meet the applicable agency specifications or performance standards. 42 U.S.C. § 6962(c)(1). Consistent with the latter provision, FAR § 23.404(b)(2) states that the contracting officer may waive requirements for using recovered materials after determining that the items containing recovered materials fail to meet performance standards in the specifications. Thus, the fact that an agency excludes recycled materials from a particular procurement does not itself indicate a violation of law or regulation.

The dismissal is affirmed.

Ronald Berger

Ronald Berger
Associate General Counsel